ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, CHIEF JUDGE

DIVISION IV

CACR07-745

February 27, 2008

PHYLLIS ELAINE STONE
APPELLANT

APPEAL FROM PULASKI COUNTY CIRCUIT COURT, FOURTH DIVISION [NO. CR-05-584]

V.

HON. JOHN LANGSTON, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Appellant, Phyllis Stone, pled guilty to violating Arkansas's hot check law and was placed on probation. A petition to revoke her probation subsequently was filed alleging that she violated the conditions of her probation by failure to report to her probation officer. After a hearing, the trial judge found that appellant inexcusably violated the conditions of her probation by failure to report, and she was sentenced to a term of imprisonment. On appeal, she argues that the evidence was insufficient to support the trial judge's finding that she violated the conditions of her probation. We affirm.

In order to revoke probation, the burden is on the State to prove by a preponderance of the evidence that there has been a violation of a condition of probation. *Bradley v. State*, 347 Ark. 518, 65 S.W.3d 874 (2002). On appellate review, the trial court's findings will be

upheld unless they are clearly against a preponderance of the evidence. *Id.* Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for a probation revocation. *Id.* Because the determination of a preponderance of the evidence turns on questions of credibility and weight to be given testimony, we defer to the trial judge's superior position. *Id.*

Here, it was undisputed that appellant was placed on probation in November 2005; that she was required as a condition of her probation to report monthly to her probation officer; and that she had not so reported for a period in excess of six months and had in fact never done so. Appellant admitted that she failed to report as ordered to her probation officer but testified that:

> I didn't show up to my probation officer because I was being threatened, me and my children. Rob Hathcock was threatening me. [Rob Hathcock] is the co-defendant on the breaking and entering [and] theft of property. [He] said that if I showed up to testify or get any more statements against him in Court he was going to get me and my kids. I was a main part of the State's case against my co-defendant. I gave a statement to the police in that matter implicating him. I notified people that he was threatening me. I told you, and I told Deputy Giever and the prosecutor. Based on those threats, I didn't show up for my court date for the breaking and entering [and] theft of property.
>
> I didn't show up to my probation officer 'cause I knew I had the failure to appear, and [knew] I would go to jail. I knew that I was supposed to have reported to my probation officer, but I was scared of Mr. Hathcock, very much so. From the time I got out of jail, he was still making threats towards me. I was scared to even be in the same room with him.

Essentially, appellant's testimony raised the affirmative defense of duress, which required her to show that, at the time of the conduct constituting the offense, she reasonably believed she was compelled to do so by the threat or use of unlawful force against her person

or the person of another that a person of ordinary firmness in her situation would not have resisted. Ark. Code Ann. § 5-2-208 (Repl. 2006); *see Barr v. State*, 336 Ark. 220, 984 S.W.2d 792 (1999). Here, appellant stated that the reason for her failure to report was fear of arrest for failure to appear at a prior scheduled hearing. With regard to her statement that she did not report because she had been threatened, the trial judge either disbelieved her self-serving testimony or considered that a reasonable person would have contacted her probation officer and explained that her failure to appear at the hearing was the result of duress. In either event, we cannot say that the trial court clearly erred in declining to find that she was compelled by duress from ever reporting to her probation officer.

Affirmed.

GLOVER and MILLER, JJ., agree.